Supreme Court, U.S.
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No. 99-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHARLES E. MCDOWELL, JR., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTION PRESENTED

Whether a federal district court reviewing a habeas corpus petition under 28 U.S.C. § 2254 can issue a discovery-related protective order pursuant to Federal Rule of Civil Procedure 26, and the federal common law evidentiary attorney-client privilege, that enjoins the State prosecutors and State courts from litigating and resolving State law evidentiary issues during a State court criminal retrial.

TABLE OF CONTENTS

	Page
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS THE WRIT SHOULD BE GRANTED	9
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
Cases	
Duckworth v. Eagan, 492 U.S. 195 (1989)	14
Estelle v. McGuire, 502 U.S. 62 (1991)	12
Kugler v. Helfant, 421 U.S. 117 (1975)	9, 13, 14, 15
McDowell v. Calderon, 107 F.3d 1351 (9th Cir. 1997)	5
McDowell v. Calderon, 130 F.3d 833 (9th Cir 1997) (*en banc*)	5
McDowell v. Calderon, 173 F.3d 1186 (9th Cir. 1999)	1, 5, 6
McDowell v. Calderon, 197 F.3d 1253 (9th Cir. 1999) (*en banc*)	1, 7, 10
People v. McDowell, 46 Cal.3d 551 (Cal. 1988)	3
Perez v. Ledesma, 401 U.S. 82 (1971)	9, 13
Spencer v. Kemna, 523 U.S. 1 (1998)	8

TABLE OF AUTHORITIES, CONT'D

Stefanelli v. Minard,
342 U.S. 117 (1951) 9, 14

Younger v. Harris,
401 U.S. 37 (1971) 9, 13, 14

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

28 U.S.C. § 2254(c) 2, 14

Cal. Pen. Code § 1054 10

Court Rules

Fed. R. C. P., Rule 26 2

Sup. Ct. R. 13.1, 13.4 2

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No. 99-____

ARTHUR CALDERON, Warden, *Petitioner*,

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OPINIONS AND JUDGMENTS BELOW

The *en banc* opinion of the United States Court of Appeals for the Ninth Circuit, affirming the district court's denial of the Warden's motion for reconsideration of a 1998 order granting habeas corpus relief as to sentence, and reaffirming the validity of a 1994 protective order, is reported as *McDowell v. Calderon*, 197 F.3d 1253 (9th Cir. 1999) (*en banc*), and is reprinted in Appendix A of this Petition. A three-judge panel of the Ninth Circuit earlier had reversed the district court's denial of the motion for reconsideration, but that opinion was withdrawn by the *en banc* court. The three-judge panel opinion, formerly reported as *McDowell v. Calderon*, 173 F.3d 1186 (9th Cir. 1999), is reprinted in Appendix B of this Petition. The district court's 1994 protective order, 1998 order granting habeas relief and reaffirming the validity of the protective order, and 1998 order denying the Warden's motion for reconsideration of the protective order, are all unpublished, and are reprinted in Appendices C-E.

JURISDICTION

The Court of Appeals' judgment issued on December 1, 1999. This Petition for Writ of Certiorari follows within 90 days. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1, 13.4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 26 of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment,

> oppression, or undue burden or expense, including one or more of the following:
>
> (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place.

STATEMENT OF THE CASE

Charles McDowell was sentenced to death following a Los Angeles County Superior Court jury trial in which he was found guilty of first degree murder with special circumstances. The California Supreme Court affirmed the conviction and sentence on August 25, 1988. *People v. McDowell*, 46 Cal.3d 551 (Cal. 1988).

On December 20, 1990, McDowell filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. On October 1, 1991, the petition was stayed in order to allow McDowell to return to State court and exhaust state remedies. McDowell's State habeas corpus petition was denied on July 9, 1992. On May 7, 1993, McDowell filed an amended petition for writ of habeas corpus in the district court. The district court ordered an evidentiary hearing with respect to McDowell's claims of ineffective assistance of counsel. Prior to the 1994 evidentiary hearing, the district court ruled that McDowell's assertion of the ineffective assistance of counsel claims constituted a waiver of the attorney-client privilege as to those claims, and entitled the Warden to discovery of certain documents in trial counsel's file. However, over the Warden's objection, the district court issued a protective order purportedly limiting the waiver of the attorney-client privilege to the federal habeas corpus proceedings only, and as to the California Attorney General's office only. The protective order provides:

> All documents produced to respondent pursuant to respondent's motion to discover trial counsel's file shall be deemed to be confidential. These documents may be used only by representatives from the Office of the California Attorney General and may be used only for purposes of any proceedings incident to the petition for writ of habeas corpus pending before this Court. Disclosure of the contents of the documents and the documents themselves may not be made to any other persons or agencies, including any law enforcement or prosecutorial personnel or agencies without an order from this Court. [¶] This order shall continue in effect after the conclusion of the habeas corpus proceedings, and specifically shall apply in the event of a retrial of all or any portion of petitioner's criminal case.

Appendix C.

During the evidentiary hearing, the substance and contents of many of the protected materials were discussed by testifying witnesses in open court without any objection by McDowell. The courtroom was never closed to the public, and McDowell never requested that it be closed.

Following the evidentiary hearing, the district court, on November 21, 1995, issued an order and opinion denying all relief. On November 29, 1995, the district court directed that the order and opinion be sealed pursuant to the protective order. The district court's judgment and order denying habeas corpus relief were entered on November 30, 1995.

McDowell appealed the district court's judgment denying relief. Many of the protected materials, and portions of the witness testimony from the evidentiary

hearing referring to those materials, were included in the excerpts of record filed in the Ninth Circuit. Again, there was no request that the excerpts of record be sealed, nor any objection to the otherwise public nature of the excerpts of record.

In a published decision filed on February 27, 1997, a three-judge panel of the Ninth Circuit affirmed the district court's denial of habeas corpus relief. *McDowell v. Calderon*, 107 F.3d 1351 (9th Cir. 1997). In its opinion, the court specifically referred to some of the documents and materials covered by the protective order. *McDowell*, 173 F.3d at 1191, *citing McDowell*, 107 F.3d at 1360-65. Following McDowell's petition for rehearing and suggestion for rehearing *en banc*, an *en banc* court reversed the panel decision, and ordered that the writ be granted as to the death sentence on an instructional issue. The case was remanded to the district court with orders to grant the writ in that respect. *McDowell v. Calderon*, 130 F.3d 833 (9th Cir 1997) (*en banc*).

Following the remand, the district court asked the parties to submit proposed orders reflecting the Court of Appeals' mandate that habeas corpus relief be granted, as well as addressing the protective order, and what vitality, if any, it should retain. Both parties submitted proposed orders, as well as objections to each other's proposed orders. On September 17, 1998, the district court entered the order granting McDowell habeas corpus relief. In that same order, over the Warden's objection, the district court provided that the February 25, 1994, protective order was to remain in full force and effect. Appendix D.

On October 1, 1998, pursuant to Federal Rule of Civil Procedure 59(e), the Warden filed a timely motion for reconsideration concerning the protective order language in the order granting habeas corpus relief. That motion was denied on the merits on November 2, 1998. Appendix E. On November 9, 1998, the Warden filed a notice of appeal, as well as a motion requesting that the

appeal be expedited, as Los Angeles County prosecutors were preparing to retry McDowell's penalty phase. As long as the protective order was in effect, the California Attorney General was precluded from disclosing relevant documents to the Los Angeles County District Attorney, and the issue of whether those documents could be used in the penalty phase retrial could not even be litigated in State court without potentially violating the federal protective order.

On April 7, 1999, a unanimous three-judge panel of the Ninth Circuit Court of Appeals, without hearing oral argument, reversed the district court's denial of the Warden's 1998 motion for reconsideration, and ordered the district court to vacate the 1994 protective order. *McDowell*, 173 F.3d 1186 (withdrawn pursuant to Ninth Circuit Rule 35-3). The panel ruled the protective order invalid because (1) it prohibited the State's federal habeas attorneys from consulting with the deputy district attorneys who prosecuted McDowell in state trial court; (2) it improperly disqualified every State attorney who worked on the federal habeas case from prosecuting the retrial; and (3) it "constitutes an unwarranted anticipatory interference with the prerogatives of the state courts," as it "effectively enjoins California courts from adjudicating a state law issue concerning McDowell's waiver of the attorney-client privilege and attempts . . . to retain continuing supervisory jurisdiction over the conduct of the retrial in state court." *Id.*, at 1191.

Thereafter, McDowell filed a petition for rehearing with suggestion for rehearing *en banc*. Pursuant to the Ninth Circuit's request, the Warden filed a response, as well as a request that the court make a decision on the petition for rehearing in an expedited manner, as the State court penalty phase retrial was scheduled to commence in July 1999.

The Ninth Circuit did not rule in time for the retrial, which ended in a deadlocked jury on August 26, 1999. On

September 23, 1999, five months after McDowell's petition for rehearing was filed, the Court of Appeals issued an order withdrawing the three-judge panel's opinion, and setting the matter to be reheard by an *en banc* court on November 18, 1999.

McDowell's second penalty phase retrial commenced, with jury selection, in late October 1999. The trial continued through November of that year. On November 18, 1999, while the second State court penalty phase retrial was proceeding, an *en banc* Ninth Circuit Court of Appeals heard oral argument in this case. On December 1, 1999, that court filed its opinion affirming the district court's denial of the Warden's motion for reconsideration of the protective order. According to the *en banc* court, the "abuse of discretion" standard of review that had been applied to denials of motions for reconsideration, and that was used by the three-judge panel here, was wrong. The *en banc* court overruled prior Ninth Circuit precedent, and changed the standard of review to that of "clear error." According to the court, the legality of the 1994 protective order was "debatable," although it did not discuss why. Therefore, the *en banc* court concluded that the district court's denial of the Warden's 1998 motion for reconsideration was not clearly erroneous. *McDowell*, 197 F.3d at 1255; Appendix B. Also on December 1, 1999, shortly after the *en banc* Court of Appeals filed its opinion, the jury in McDowell's second State court penalty phase retrial returned a verdict of death. McDowell is

currently appealing that non-final judgment in the California Supreme Court.[1]

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1. This federal appeal is not moot, despite the fact that McDowell's State court penalty phase retrial proceedings have concluded. The issue concerning the propriety of a federal protective order that effectively enjoins State prosecutors and courts from litigating and adjudicating State law issues in State court criminal proceedings is capable of repetition, yet evading review. *Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998) (case not moot where it is capable of repetition, yet evading review). Here, as exemplified by this case, it proved impossible for the federal appeal to be litigated and resolved prior to the conclusion of the *second* state court penalty phase retrial, let alone the first one. Moreover, there is a reasonable expectation that the Warden and California Attorney General, the complaining party in this case, will be subject to the unlawful protective order again. *Id.* McDowell's state case now automatically proceeds to the California Supreme Court for appellate, and in all likelihood, collateral review. After the conclusion of state proceedings, McDowell will undoubtedly file another federal habeas corpus petition. Should he obtain relief in either state or federal court, and gain yet another penalty phase retrial, or should there be an evidentiary hearing in a state collateral proceeding, California's prosecutors and courts will continue to feel the effect of the 1994 protective order. Moreover, there are several California cases other than this one where similar protective order issues have surfaced. *See, e.g., Randolph v. Smith*, CIV S-93-5604 REC JFM P; *Ghent v. Calderon*, C-90 02763 WAI TSC; *Hubka v. Olivarez*, CV 96-1628 J(JFS); *Grant v. Calderon*, CIV-S-90-0779 DFL JFM; *Jennings v. Calderon*, C-89-1360 WAI; *Hunter v. Vasquez*, C 90-3275 JW.

REASONS THE WRIT SHOULD BE GRANTED

The protective order, precluding the use of certain evidence in the State court retrials, is not authorized by the Federal Rules of Civil Procedure or by the federal common-law privilege for attorney-client communications, neither of which governs State court proceedings; and, in effectively enjoining the litigation and resolution of State law evidentiary issues in the retrial, the order impermissibly interferes with the State's core function of enforcing its criminal law, in violation of the principles of *Younger v. Harris*, 401 U.S. 37 (1971).

By ruling that the protective order was to "remain in effect," despite the fact that the federal proceedings had concluded, the district court wrongfully invaded the sovereign jurisdiction of the co-equal California courts. The protective order hamstrung the State's ability to enforce the criminal law because it effectively enjoined its prosecutors from even seeking to determine whether, under State law, McDowell had waived the attorney-client privilege with respect to certain materials, and what impact that waiver had on other State law evidentiary issues. Similar federal court meddling into ongoing State criminal proceedings has been denounced by this Court time and time again. *Younger v. Harris*, 401 U.S. 37 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Kugler v. Helfant*, 421 U.S. 117 (1975); *Stefanelli v. Minard*, 342 U.S. 117 (1951).

The federal court interference here is even more egregious than in any of the foregoing cases. At least in the cases cited above, state court defendants sought federal enforcement of the federal Constitution, which obviously applies to State court criminal proceedings. But

here, the power sources that served as the basis for the district court's protective order were only Federal Rule of Civil Procedure 26 and the federal common law attorney-client privilege. Neither *ever* applies to state court proceedings; and, therefore, neither may *ever* provide the basis for the federal interference in state law issues experienced in this case.

The United States Court of Appeals for the Ninth Circuit, sitting *en banc*, failed to address the issue of whether a federal court could enjoin a State trial court from deciding an evidentiary issue based entirely on State law. The Court of Appeals reached its decision, first, by changing its procedural law to elevate the standard of review applied to denials of reconsideration motions from "abuse of discretion" to "clear error." *McDowell*, 197 F.3d at 1254-55; Appendix B. Then, without any discussion or analysis, the Ninth Circuit found the legality of the protective order, which unquestionably interfered in a State court criminal proceeding, to be somehow "debatable," so that the district court's denial of the Warden's motion for reconsideration of the protective order was not "clearly erroneous."[2] *Id.* Thus, the merits

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2. In a footnote, the *en banc* court observed:

> The parties agree that the protective order does not preclude the District Attorney from seeking to obtain from McDowell's original trial counsel the same documents that were turned over to the Attorney General. Any such attempt would be governed by state law.

McDowell, 197 F.3d at 1255.

The Ninth Circuit missed the point. First, the Warden *did not* agree that the protected documents could be obtained in the manner suggested in the footnote above. In fact, under California Penal Code section 1054, such a discovery attempt would have been unsuccessful as a matter of law. The contents of trial counsel's file, and the

were avoided; but the harm stood.

It is wholly irrelevant what traditional type of standard of review is applied to a motion for reconsideration of a protective order that reaches beyond the federal proceedings in which it was issued, and into sovereign state court proceedings that are not subject to the federal common law and statutory authority cited as the order's purported bases. The standard could not be elevated high enough to *ever* allow a protective order like the one issued in this case to pass muster. The 1994 protective order issued in this case, reaffirmed in the 1998 order granting habeas corpus relief, so offends the values of comity and federalism intimately associated with federal habeas corpus proceedings, that it cannot possibly be a valid exercise of federal court power.

A standard of review cannot make permissible what this Court has already held on several occasions to be an impermissible exercise of federal court power. The federal protective order, not based on the Constitution or any federal statute applicable to the states, expressly

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statements of the defendant to his attorney, are not discoverable when trial counsel's conduct is not an issue, and there was no such issue during McDowell's retrials. However, if the State already has in its possession documents not ordinarily discoverable, the discovery statute has no preclusive effect on whether such documents may be admitted against a defendant in State court. Thus, only in the absence of the protective order could the State-law evidentiary issues have been litigated in the State retrials.

Moreover, the State should not be compelled to engage in interpretative gymnastics with the language in the protective order, and go through a back door to obtain and use materials in State court simply because the front door is blocked by an unlawful federal court order, especially when, as described above, the back door is not even an option. The fact that the Ninth Circuit seemed willing to suggest a way for the State to circumvent the protective order might have been an acknowledgement on the court's part that the order cannot validly restrict the State's use of evidence in State court.

precludes the use of any of the documents subject to the order in any State retrial. Appendix C ("This order shall continue in effect after the conclusion of the habeas corpus proceedings, *and specifically shall apply in the event of a retrial of all or any portion of petitioner's criminal case*" (emphasis added)). The protective order operated like a time bomb in this respect, set to "go off" during ongoing State criminal proceedings if and when McDowell received a state court retrial. The protective order was essentially meaningless until federal habeas corpus relief was granted and a State court retrial commenced. Once relief was granted, and the State commenced retrial proceedings, the illegal effect of the protective order was first felt, as it interfered with the State's right to litigate the State law issue of whether McDowell had waived the attorney-client privilege, and other admissibility issues which would have flowed from a ruling finding such a waiver.

Because the attorney-client evidentiary privilege is not mandated by the federal Constitution or any federal statute applicable to the states, any State court adjudication of an issue of its waiver will necessarily involve the application of State law exclusively. This Court has made it abundantly clear that it is not for the federal courts to re-examine state court rulings on state law questions. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). By the same token, then, it cannot be appropriate for the federal courts to instruct the state courts how to rule, or not to rule, on state law questions in the first instance. *See id*; *see also Kugler*, 421 U.S. 117. Nevertheless, the federal protective order effectively does just that.

The protective order totally precludes a State law determination on the attorney-client privilege issue in State court because, according to the federal district court, the documents "may be used only for purposes of any proceedings incident" to the federal habeas corpus proceedings. Appendix C. Thus, if the State prosecutor

were to ask the State trial court to make a ruling *based on State law* as to whether McDowell waived the attorney-client privilege, and whether such a waiver made admissible documents previously disclosed to the California Attorney General, both the State prosecutor, and the State trial court, would risk violating the order and, perhaps, being held in contempt by the federal district court. Neither California prosecutors, nor California courts, should be impeded in this way, or placed in such a precarious position.

As noted above, the abstention doctrine developed by this Court in *Younger v. Harris*, 401 U.S. 37, and the reasons for that doctrine, are very instructive here. In *Younger*, this Court held that federal courts may not enjoin pending state court criminal proceedings. The *Younger* abstention doctrine applies even if there is an allegation of a constitutional violation, and even though all jurisdictional and justiciability requirements are met. The rationale for the *Younger* decision was based on considerations of equity and comity. *Id.*, at 43-44. As Justice Black wrote for the *Younger* Court, "the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." *Id.*, at 44.

The *Younger* doctrine applies in the context of admissibility of evidence issues, such as the one in this case. In *Perez v. Ledesma*, 401 U.S. 82, this Court held that the federal courts could not suppress evidence in a pending state court criminal proceeding, even on federal constitutional grounds. As this Court stated, with respect to the federal court's suppression ruling, "It is difficult to imagine a more disruptive interference with the operation of the state criminal process short of an injunction against all state proceedings." *Id.*, at 84. Further, in accordance with the principles of *Younger*, "such federal interference with a state prosecution is improper." *Id.*; *see also Kugler*, 421 U.S. at 130 ("in the absence of 'extraordinary

circumstances' federal courts must refuse to intervene in state criminal proceedings to suppress the use of evidence claimed to have been obtained through unlawful means"); *Stefanelli*, 342 U.S. at 120 ("the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure").

The considerations of comity and equity that inspired *Younger* apply with no less force here. There was no valid reason to preempt a State court ruling on whether various documents and materials were admissible under State law in McDowell's retrials. If the formerly privileged documents were ruled admissible by the State court, and McDowell believed that the effect of such a ruling violated his rights under the federal Constitution, he could seek review of an adverse result in a petition for writ of certiorari or in federal habeas corpus.

In sum, the rationale for *Younger* stems from concerns for equity and comity. Those same concerns are prevalent in every 28 U.S.C. § 2254 habeas corpus proceeding. In fact, Justice O'Connor has keenly observed that lower federal court review of decisions of the highest courts of a state judicial system "has always been a flashpoint of tension in the delicate relationship of the federal and state courts, and this exercise of federal power should not be undertaken lightly where no significant federal values are at stake." *Duckworth v. Eagan*, 492 U.S. 195, 211 (1989) (conc. opn. of O'Connor, J.). Whether under the comity principles that inspired the *Younger* decision, or similar principles present in habeas corpus cases, federal courts must abstain from interfering with state court criminal proceedings, particularly with respect to evidentiary issues where no federal Constitutional values are at stake. This Court has already made clear that federal interference in state court affairs via "either injunction or declaratory judgment" is improper. *Kugler*, 421 U.S. at 123. Certiorari should be granted in this case

so that protective orders issued in federal habeas corpus proceedings can be added to the list of devices the federal courts are prohibited from using to interfere with ongoing State court criminal proceedings.

CONCLUSION

For these reasons, the Warden, and the State of California, respectfully request that this Court issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

Dated: February 29, 2000.

Respectfully submitted,

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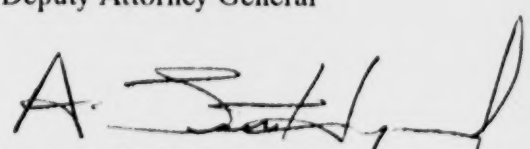

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APPENDIX A

For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charles E. McDOWELL, Jr., Petitioner-Appellee,

v.

Arthur CALDERON, Warden, Respondent-Appellant.

No. 98-99032

D.C. No. CV 90-4009-MRP

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted Nov. 18, 1999
San Francisco, California

Filed December 1, 1999

Before: HUG, Chief Judge, and BROWNING, PREGERSON, BRUNETTI, KOZINSKI, RYMER, T. NELSON, KLEINFELD, TASHIMA, SILVERMAN, and GRABER, Circuit Judges.

Following affirmance, 46 Cal.3d 551, 763 P.2d 1269, 250 Cal.Rptr. 530, of convictions of murder and other offenses, Petitioner sought habeas corpus relief. The United States District Court for the Central District of California, Mariana R. Pfaelzer, J., denied petition, and petitioner appealed. Following remand, 130 F.3d 833, the District Court granted habeas relief as to death sentence

and also reaffirmed its earlier protective order covering attorney-client material previously disclosed to the state Attorney General. Following denial of motion to reconsider, the state Attorney General appealed. The Court of Appeals, 173 F.3d 1186, remanded. On rehearing en banc, the Court of Appeals held that the district court did not commit clear error when it limited access to documents discovered from trial counsel's file, by prohibiting disclosure to "prosecutorial personnel or agencies" for use in connection with petitioner's penalty phase retrial.

Affirmed.

A. Scott Hayward, Deputy Attorney General, Los Angeles, California, for the respondent-appellant.
Andrea G. Asaro, Rosen, Bien & Asaro, San Francisco, California, for the petitioner-appellee.

PER CURIAM:

Charles McDowell was convicted of murder and sentenced to death by the State of California. In December 1990, he filed a petition for writ of habeas corpus in the Central District of California. Among other issues, he raised claims of ineffective assistance of counsel. The district court recognized that McDowell's ineffective assistance claims waived his attorney-client privilege as to those matters pertaining to the attorney's representation of McDowell at trial. See, e.g., Wharton v. Calderon, 127 F.3d 1201, 1203 (9th Cir. 1997). However, the district court did not simply release the materials to the California Attorney General. Rather, on February 25, 1994, it entered a protective order stating that the Attorney General could use any documents produced from the trial counsel's file only for purposes of the pending habeas litigation. By the terms of the order, this restriction was

to continue in effect after the conclusion of the habeas proceedings and would apply "in the event of a retrial of all or any portion of [McDowell's] criminal case."

The district court denied McDowell's petition, but we reversed on appeal as to the death sentence. McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997). On September 15, 1998, the district court entered an order granting the writ of habeas corpus. That order also provided that the February 25, 1994, protective order "shall remain in effect." The Attorney General filed a timely motion to alter or amend the judgment under Fed.R.Civ.P. 59(e). In it, he asked the district court to vacate the protective order on the ground that it "should not have been issued," because federal law does not provide for partial waivers of attorney-client privilege. The district court denied the motion on November 2, 1998. The Attorney General appeals.

The only order that is the subject of this appeal is the district court's order of November 2, 1998, denying the warden's motion for reconsideration under Fed. R.Civ.P. 59(e). See Notice of Appeal, filed Nov. 9, 1998 ("[Respondent ... hereby appeals ... from the November 2, 1998, denial of respondent's motion to alter or amend the judgment. . . ."); Appellant's Opening Brief at 5 (stating the issue as "[w]hether the district court erred in denying respondent's motion to amend the order. . . ."). The warden did not appeal either the protective order of February 25, 1994, or the order of September 15, 1998, which reaffirmed the protective order. Those prior orders are therefore not before us.

A motion for reconsideration under Rule 59(e) "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999) (emphasis added) citing School Dist. No. 1J v.

ACandS, Inc., 5.3d 1255, 1263 (9th Cir. 1993).[1] In moving for reconsideration, the warden alleged neither the discovery of new evidence nor an intervening change in the controlling law. Therefore, the only question before us is whether the district judge committed clear error in entering the protective order.[2]

In answering this question, we do not review de novo the legal basis for the protective order, as we would if this were an appeal from the order itself. See Floyd v. Laws, 929 F.2d 1390, 1400 (9th Cir. 1991) ("An appeal from a denial of a Rule 60(b) motion brings up only the denial of the motion for review, not the merits of the underlying judgment.") (citing Molloy v. Wilson, 878 F.2d 313, 315

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1. See also 11 Charles Alan Wright et al., Federal Practice and procedure S 2810.1 (2d ed. 1995):

> Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion. However, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. . . . Fourth, a rule 59(e) motion may be justified by an intervening change in controlling law. (footnotes omitted)(emphasis added).

2. When, on the other hand, we review a district court's refusal to modify a protective order on the ground of changed circumstances, the legal basis for the original order is not at issue. See Olympic Refining v. Carter, 332 F.2d 260, 264 (9th Cir. 1996).

(9th Cir. 1989).[3] Rather, we ask whether the protective order involved a clear error of law. See e.g., Faile v. Upjohn Co., 988 F.2d 985 (9th Cir. 1993) (reversing denial of a Rule 60(b) motion to vacate dismissal, where the district court had failed to apply provision of Fed.R.Civ.P. 5(b) that service is complete upon mailing.[4]

The warden contends that, because raising ineffective assistance of counsel claims in a habeas petition waives the attorney-client privilege, the district court erred in prohibiting the Attorney General from disclosing the documents discovered from McDowell's trial counsel's file to "prosecutorial personnel or agencies" for use in connection with McDowell's penalty phase retrial.[5] It is debatable whether the district court can so limit the Attorney General's use of the documents from McDowell's trial counsel's file. The question being a debatable one, the district court did not commit clear error when it limited access to the file pursuant to the

---

3. The denial of a motion for reconsideration under Rule 59(e) is construed as a denial of relief under rule 60(b). See Pasatiempo v. Aizawa, 103 F.3d 796, 801 (9th Cir. 1996).

4. Our cases reviewing denials of reconsideration have, on occasion, failed to recognize that only a failure to correct clear error constitutes abuse of discretion in this context. See, e.g., Faile, 988 F.2d at 986-87; Uniques v. Cabral, 985 F.2d 1031, 1034 (9th Cir. 1993). For the reasons explained above, we disapprove any suggestion in these cases that a refusal to reconsider is an abuse of discretion merely because the underlying order is erroneous, rather than clearly erroneous. In order to invoke our authority to review de novo for ordinary error, a party must appeal the order itself, rather than a refusal to reconsider the order.

5. The parties agree that the protective order does not preclude the District Attorney from seeking to obtain from McDowell's original trial counsel the same documents that were turned over to the Attorney General. Any such attempt would be governed by state law.

terms of the protective order. District courts have very broad discretion in fashioning discovery orders under Fed. R.Civ.P. 26(c), and the protective order did not fall clearly outside the bounds of that authority. The district court therefore did not abuse its discretion in denying reconsideration. See Pasatiempo, 103 F.3d at 801 (denial of a motion to alter or amend judgment under Fed.R.Civ.P. 59(e) may be reversed only for abuse of discretion).

AFFIRMED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES E. McDOWELL,
Petitioner-Appellee,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellant.

No. 98-99032
D.C. No.
CV-90-04009-MRP
OPINION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Submitted January 5, 1999[1]
San Francisco, California

Filed April 7, 1999

Before: Charles E. Wiggins, David R. Thompson, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott; Partial Concurrence by Judge Thompson

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals vacated an order of the district court. The court held that a district court's authority to protect the attorney-client privilege does not normally apply when a fed-

[1]The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2)(C).

eral habeas corpus petitioner impliedly waives it by alleging ineffective assistance of counsel.

On federal habeas corpus following his California capital conviction and sentence of death, appellee Charles McDowell alleged that his right to effective assistance had been violated. The district court determined that the claim constituted a waiver of the attorney-client privilege, and ruled that McDowell's attorneys were entitled to examine certain documents in the file of McDowell's trial counsel. The court also issued a protective order limiting the waiver to the federal habeas proceedings, and restricting access to the materials exclusively to the California Attorney General.

McDowell's claim failed, but he prevailed on appeal on a different claim relating to the penalty phase of his trial. In accordance with the Ninth Circuit's remand, the district court entered an order granting McDowell habeas relief regarding his death sentence, and reaffirming the protective order covering the attorney-client material previously disclosed to the Attorney General. The court denied the Attorney General's motion to reconsider the protective order. The Attorney General appealed.

[1] Although the protective order might have been disposed of on the initial appeal, the Attorney General's failure to do so did not constitute a default or waiver. The issue took on new significance with the district court's final order, and the state's decision in light of that order to retry the penalty phase. Moreover, the district court reheard and reconsidered the issue on remand based on new briefs and arguments. [2] The order was final and ripe for consideration on appeal.

[3] When a habeas corpus petitioner raises a Sixth Amendment claim of ineffective assistance of counsel, he waives the attorney-client privilege as to the matters challenged. Moreover, the privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confi-

dential communications between a client and a lawyer. The rule does not apply where there is no forced disclosure. Thus, a court's authority to "protect" the attorney-client privilege does not extend, at least in the absence of some compelling circumstances, to non-compelled, voluntary disclosures.

[4] The untoward consequences of the protective order were transparent. First, the state lawyers handling the defense in federal court would be disadvantaged because the order's anti-disclosure provisions prevented full consultation with the prosecutors who originally tried the case. This disadvantage attached to a constitutional issue that had the capacity to undo a conviction. Such a disadvantage was inconsistent with the implied waiver of the privilege, and saddled the respondent with an undue handicap. The order interfered with the State's ability to demonstrate that any errors of counsel did not cause prejudice at trial. It was hard to imagine a more obvious source of information on this central issue than the State's trial lawyers.

[5] Moreover, any state lawyer defending against McDowell's habeas petition would have been disqualified by the order as trial counsel in any retrial in state court.

[6] Furthermore, such a protective order might encourage federal courts causing a new trial in state court—while at the same time trying to keep information away from prosecutors —either to obscure the constitutional reasons for such an intrusion into the affairs of the state, or to seal the material from public scrutiny. Some of the material McDowell sought to protect was included without seal or protection in his public excerpt of record on appeal, and referred to in the Ninth Circuit's opinion.

[7] Accordingly, because there were no compelling circumstances, the district court's protective order misapprehended the law regarding the scope of the attorney-client privilege and was an unintended abuse of discretion.

[8] The protective order at this stage was clearly aimed at the scheduled retrial in state court of the penalty issue. As such, the order presupposed the potential of an evidentiary ruling in state court that might violate McDowell's rights. Under those circumstances, the order constituted an unwarranted anticipatory interference with the prerogatives of the state courts. The order effectively enjoined California courts from adjudicating a state-law issue concerning McDowell's waiver of the attorney-client privilege, and attempted to retain continued supervisory jurisdiction over the conduct of the retrial in state court. Such an unprecedented order contravened basis principles of comity and federalism.

Judge Thompson concurred in part, but wrote separately to state that the court should not have addressed the issue of the protective order's initial validity.

COUNSEL

Robert F. Katz, Deputy Attorney General, and A. Scott Hayward, Deputy Attorney General, Los Angeles, California, for the respondent-appellant.

Andrea G. Asaro, Rosen, Bien & Asaro, San Francisco, California, for the petitioner-appellee.

OPINION

TROTT, Circuit Judge:

McDowell, a state prisoner originally sentenced to death, petitioned for a writ of habeas corpus in the United States District Court for the Central District of California on December 20, 1990. Among his numerous claims was an allegation that his Sixth Amendment right to effective assistance of

counsel had been violated. The district court ordered an evidentiary hearing on this claim and ruled that the claim constituted a waiver of the attorney-client privilege. Accordingly, the district court ruled that Calderon's lawyers were entitled to examine certain relevant documents in McDowell's trial counsel's file. This ruling was accompanied by a protective order limiting the waiver of the attorney-client privilege to the federal habeas corpus proceedings and restricting access to the relevant materials exclusively to the California Attorney General. The original protective order reads as follows:

> All documents produced to respondent pursuant to respondent's motion to discover trial counsel's file shall be deemed to be confidential. These documents may be used only by representatives from the Office of the California Attorney General and may be used only for purposes of any proceedings incident to the petition for writ of habeas corpus pending before this Court. Disclosure of the contents of the documents and the documents themselves may not be made to any other persons or agencies, including any law enforcement or prosecutorial personnel or agencies without an order from this Court.
>
> This order shall continue in effect after the conclusion of the habeas corpus proceedings, and specifically shall apply in the event of a retrial of all or any portion of petitioner's criminal case.

Ultimately, McDowell's claim of ineffective assistance of counsel failed. *See McDowell v. Calderon*, 107 F.3d 1351, 1362 (9th Cir. 1997), *amended and superseded in part by* 116 F.3d 364 (9th Cir. 1997). However, he prevailed on appeal on a different claim relating to the penalty phase of his trial. As a consequence, we remanded the matter to the district court with instructions to grant the writ as to McDowell's sentence of death. *See McDowell v. Calderon*, 130 F.3d 833, 841 (9th Cir. 1997).

In accordance with our remand, the district court entered for the first time an order on September 17, 1998, granting McDowell habeas corpus relief as to his "sentence of death in Los Angeles Superior Court Case Number A379325 entered on October 23, 1984." In this order, the district court reaffirmed its earlier protective order covering the attorney-client material previously disclosed to the Attorney General.

On October 1, 1998, pursuant to Fed. R. Civ. P. Rule 59(e), the Attorney General filed a timely motion to reconsider the protective order. The motion was denied on its merits by the district court. This appeal followed.

The Attorney General phrases the issue we now address as follows:

> Respondent did not ask the district court, and is in no way asking this Court, to "authorize" the use of any documents at petitioner's state court penalty phrase retrial. In fact, respondent's primary contention in this appeal is that the federal courts should abstain from interfering with evidentiary issues in petitioner's pending state court criminal retrial. In other words, what respondent is asking of this Court is to reverse the district court so that California courts and California prosecutors can litigate and adjudicate the state law waiver and admissibility issues without federal court interference, in accordance with the manner the United States Supreme Court consistently ruled in this regard. . . . [T]he continued operation of the federal protective order has the effect of enjoining state prosecutors and the state courts from addressing the purely state law issue of whether petitioner waived the attorney-client evidentiary privilege, and whether documents disclosed pursuant to that waiver will be admissible in petitioner's state court penalty phrase retrial. And as also previously

discussed, such federal court interference in a pending state court criminal matter is improper.

McDowell seeks dismissal of this appeal and sanctions against the Attorney General under Fed. R. App. P. 38, or in the alternative, summary affirmance of the district court's denial of the Rule 59(e) motion.

We have jurisdiction over this appeal from the Attorney General's motion to reconsider, and we dissolve and vacate the district court's protective order.

I

The standard of review of a protective order is for an abuse of discretion. A district court abuses its discretion when it acts on the basis of an erroneous legal premise. *Koon v. United States*, 518 U.S. 81, 99 (1996); *Wharton v. Calderon*, 127 F.3d 1201, 1205 n.6 (9th Cir. 1997).

II

McDowell argues that, by not challenging the disputed order on appeal when the case first came to the Ninth Circuit and by accepting the documents in the district court in connection with the evidentiary hearing subject to the terms and conditions of the protective order, the Attorney General has waived any right to object.

[1] Although the protective order at issue might have been disposed of on the initial appeal, we hold that the Attorney General's failure to do so in these circumstances does not constitute a default or a waiver. The protective order issue took on new significance with the district court's final order of September 17, 1998, and the state's decision in light of that order to retry the penalty phase. Moreover, it is clear from the record, and from the district court's comment on August 31, 1998, that the district court reheard and reconsidered the issue

on remand based on new briefs and arguments.[2] The text of the district court's order on November 2, 1998, is as follows: "Respondent Calderon's Motion for Reconsideration came before the Court for hearing on November 2, 1998, and the Court took the motion under submission. Having considered the papers filed and the arguments of counsel, the Court now denies the motion for reconsideration."

[2] This is a final order now ripe for consideration on appeal. We hear and decide it as such.

III

[3] The law on this issue is straightforward and uncomplicated. It is the law of this circuit that when a petitioner in a habeas corpus action raises a Sixth Amendment claim of ineffective assistance of counsel, he waives the attorney-client privilege as to the matters challenged. *Wharton*, 127 F.3d at 1203. Moreover, the "privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a client and a lawyer." *Id.* at 1205 (quoting *United States v. Rogers*, 751 F.2d 1074, 1077 (9th Cir. 1985)). The rule does not apply where there is no "forced disclosure of a confidential communication in a judicial proceeding." *Rogers*, 751 F.2d at 1077. "Thus, a court's authority to 'protect' the attorney-client privilege simply does not extend, at least absent some compelling circumstances to non-compelled, voluntary, [disclosures], any more than it does to an after-dinner conversation. The attorney-client privilege is a rule of evidence." *Wharton*, 127 F.3d at 1205.

The facts and circumstances of *Wharton* are instructive in the present controversy. In *Wharton*, we faced a situation

[2]We find no merit to *McDowell's* argument that by accepting over protest the disputed material subject to the protective order the Attorney General necessarily accepted for all time its improper conditions.

where a district court attempted, with a protective order, to chaperon an implied waiver of the attorney-client privilege occasioned by an ineffective assistance of counsel claim brought by a habeas petitioner regarding his state court trial. To "safeguard . . . the scope of [the] implied waiver," the district court entered a protective order prohibiting the respondent Warden "from communicating with Petitioner's former trial or appellate counsel and their agents about any matters relating to Petitioner's Petition for a Writ of Habeas Corpus except in a deposition setting with Petitioner's counsel present." *Id.* at 1203. On appeal, we vacated the order on the grounds that it was (1) irreconcilable with the controlling law regarding the waiver of the privilege, and (2) beyond the recognized authority of a federal district court either (a) to regulate the conduct of the attorneys appearing before it or (b) to exercise its "inherent authority." *Id.* at 1207.

[4] The untoward consequences of a protective order such as the order we face in the present case are readily transparent. First, the state lawyers handling the defense in federal court would be disadvantaged by the order because its anti-disclosure provisions prevent full consultation with the prosecutors who originally tried the case. This disadvantage attaches not to a peripheral matter, but necessarily to a constitutional issue that has the capacity to undo a conviction. Such a disadvantage is flatly inconsistent with the implied waiver of the privilege and saddles the respondent with an undue handicap. Among other obvious particulars, the order interferes with the State's ability to demonstrate that any errors of counsel did not cause any prejudice at trial. As we said earlier in this case, McDowell "must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *McDowell*, 107 F.3d at 1356. It is hard to imagine a more obvious source of information on this central issue than the State's trial lawyers. One can even imagine an extension of the district court's order to exclude state court prosecutors — or even the media

— from the federal courtroom during the litigation of the issue, which we note usually includes an evidentiary hearing.

[5] Moreover, any state lawyer defending against McDowell's habeas petition would be disqualified by the Order as trial counsel in any retrial in state court even if his mission were to guard against a repeat of the situation that brought about the Sixth Amendment claim in this case. We are unable to locate any authority that would support such a result.

[6] Furthermore, such a protective order might encourage federal courts causing a new trial in state court — while at the same time trying to keep information away from prosecutors — either to obscure the constitutional reasons for such an intrusion into the affairs of the state, or to seal the material from public scrutiny. How else could a federal court keep information from prosecutors yet use it as a basis to undo a conviction? To articulate this problem is to expose its irreconcilability with the principles of open courts, public trials, and judicial accountability. We note in this case that some of the very material McDowell now seeks to protect was openly included without seal or protection in his public excerpt of record on appeal and referred to by us in our opinion. *See McDowell*, 107 F.3d at 1360-65 (relating to the intoxication defense, use of a mental health expert, and mitigating evidence not introduced). This only highlights the folly of attempting to enforce such an order and the extreme length a court would be required to go to in order to make it effective.[3]

[7] Accordingly, and because we find no "compelling circumstances" in this case, we conclude under the authority of *Wharton* that the district court's protective order misapprehended the law regarding the scope of the attorney-client privilege and was thus an unintentional abuse of discretion.[4]

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[3]Calderon points to these disclosures as the separate basis of a waiver of the privilege, an issue we decline to address.

[4]McDowell's attempt to spin what is at its core an attorney-client privilege issue as a "work product privilege" issue is unpersuasive. In any

IV

[8] The district court's protective order suffers from another fatal defect. The order at this stage of the proceedings is clearly aimed at the scheduled retrial in state court of the issue of the penalty McDowell must suffer for the murder of which he stands lawfully convicted. As such, the district court's order presupposes the potential of an evidentiary ruling in state court that might somehow violate McDowell's rights. Under these circumstances, we conclude that the district court's order constitutes an unwarranted anticipatory interference with the prerogatives of the state courts. The protective order effectively enjoins California courts from adjudicating a state law issue concerning McDowell's waiver of the attorney-client privilege and attempts — as requested by McDowell — to retain continuing supervisory jurisdiction over the conduct of the retrial in state court. Such an unprecedented order contravenes basic principles of comity and federalism. As the Supreme Court said in *Younger v. Harris*, 401 U.S. 37, 43-44 (1971), "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *See also Perez v. Ledesma*, 401 U.S. 82, 84 (1971). ("[T]he . . . admissibility of evidence in state criminal prosecutions [is] ordinarily [a] matter[ ] to be resolved by state tribunals . . . , subject, of course, to review by certiorari or appeal in [the United States Supreme] Court or, in a proper case, on federal habeas corpus . . . ."); *see, e.g., Stefanelli v. Minard*, 342 U.S. 117, 120 (1951) ("[F]ederal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure."). As the Supreme Court said in *Pitchess v.*

---

event, were we to regard it as such, we would hold that it, too, has been waived. A petitioner on habeas corpus attacking the work product of his attorney cannot expect to both preserve his cake and also consume it as he sees fit.

Davis, 421 U.S. 482, 490 (1975), "Neither Rule 60(b), 28 U.S.C. § 2254 [28 U.S.C.S. § 2254], nor the two read together permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by a habeas court."

V

We remand this matter to the district court with instructions to vacate the protective order and to eliminate all references to it from the Order of September 17, 1998, granting McDowell's petition for a writ of habeas corpus.[5]

REMANDED.

THOMPSON, Circuit Judge, concurring in part:

I concur in the result reached by the majority. I would not, however, reach the question of the protective order's initial validity, which the majority discusses in part IV. In my view, it is enough that we hold, consistent with the majority's analysis in part V, that the protective order presently constitutes an improper interference with the prerogatives of the state courts. Accordingly, disassociating myself from part IV of the majority opinion, I concur in the judgment.

---

[5]Petitioner McDowell's request for sanctions is denied.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES E. McDOWELL, JR.,	) **DEATH PENALTY**
	)
Petitioner,	) CASE NO.
	) CV 90-4009 (MRP)
	)
v.	) PROTECTIVE ORDER
	) COVERING DOCUMENTS
	) FROM TRIAL COUNSEL'S
	) FILE
ARTHUR CALDERON, Warden	)
of the California State Prison	)
at San Quentin,	)
	)
Defendant.	)
	)

All documents produced to respondent pursuant to respondent's motion to discover trial counsel's file[1/] shall be deemed to be confidential. These documents may be used only by representatives from the Office of the California Attorney General and may be used only for purposes of any proceedings incident to the petition for writ of habeas corpus pending before this court. Disclosure of the contents of the documents and the documents themselves may not be made to any other persons agencies, including any law enforcement or prosecutorial personnel or agencies without an order from this court.

---

1. The documents which must be produced are set forth in a separate order filed concurrent with this order.

This order shall continue in effect after the conclusion of the habeas corpus proceedings, and specifically shall apply in the event of a retrial of all or any portion of petitioner's criminal case.

IT IS SO ORDERED.

Dated: February 25, 1994

/s/ Mariana R. Pfaelzer
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES E. MC DOWELL, JR.,	)	
	)	
Petitioner	)	CASE NO.
	)	CV 90-4009 (MRP)
	)	
v.	)	ORDER ISSUING
	)	WRIT OF HABEAS
	)	CORPUS
ARTHUR CALDERON, Warden	)	
of the California State	)	THIS CONSTITUTES
Prison at San Quentin,	)	NOTICE OF ENTRY AS
	)	REQUIRED BY FRCP,
Defendant.	)	RULE 77(d)
	)	

In an Amended Petition for Writ of Habeas Corpus (the "Petition") filed on or about May 7, 1993, Petitioner Charles E. McDowell, Jr., sought reversal of his convictions of murder, attempted murder, attempted rape and burglary, and reversal of his sentence of death. In an order filed on November 21, 1995, this Court denied the Petition in its entirety. In an opinion filed on November 24, 1997, the United States Court of Appeals for the Ninth Circuit reversed this Court's judgment as to Petitioner's death sentence and remanded the matter to this Court with instructions to grant the writ as to Petitioner's sentence of death. McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997), cert. denied, 118 S. Ct. 1575, 140 L. Ed. 2d 807 (1998). Therefore,

IT IS HEREBY ORDERED as follows:

Petitioner's Amended Petition for Writ of Habeas Corpus is granted with respect only to the sentence of

death in Los Angeles Superior Court Case Number A379326 entered on October 23, 1984. Nothing in this Order prohibits the State of California from conducting a retrial of the penalty phase of Petitioner's trial.

The Protective Order Covering Documents From Trial Counsel's File issued by this Court on or about February 25, 1994, shall remain in effect.

Dated: September 15, 1998

/s/ Mariana R. Pfaelzer
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 90-4009 MRP DATE: 11/2/98

Title: McDowell v. Calderon

PRESENT: HON. MARIANA R. PFAELZER, Judge

Robert J. Flores	Beth Esther Zacarro
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: NA

ATTORNEYS PRESENT FOR DEFENDANT: NA

PROCEEDINGS:

Respondent Calderon's Motion for Reconsideration came before the Court for hearing on November 2, 1998, and the Court took the motion under submisssion. Having considered the papers filed and the arguments of counsel, the Court now denies the motion for reconsideration.

cc:
Andrea G. Asaro
Robert F. Katz

99-1500

Supreme Court, U.S.
FILED
MAR 8 2000
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 99-___

ARTHUR CALDERON, Warden

Petitioner,

v.

CHARLES E. McDOWELL, JR.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION
AND
MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

DEATH PENALTY CASE

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Charles E. McDowell, Jr.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 99-___

ARTHUR CALDERON, Warden,

Petitioner,

v.

CHARLES E. McDOWELL, JR.,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent Charles E. McDowell, Jr., by his undersigned counsel, asks leave to file his Brief in Opposition to the instant Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis,* pursuant to Rule 39. Respondent has been represented by the undersigned court-appointed attorney in the United States District Court for the Central District of California and in the United States Court of Appeals for the Ninth Circuit, pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.

DATED: March 1, 2000

Andrea G. Asaro
Counsel for Respondent
Charles E. McDowell, Jr.

QUESTION PRESENTED

In February 1994, during federal habeas corpus proceedings, the district court entered a protective order limiting the Attorney General's disclosure of certain documents produced to him in discovery, consisting of copies of confidential documents from trial counsel's files. In September 1998, in its order granting the writ of habeas corpus as to the sentence of death, the court reaffirmed that the protective order would remain in effect.

- Did the Ninth Circuit Court of Appeals, *en banc*, correctly conclude: (1) that the district court did not abuse its discretion in denying the Attorney General's Rule 59(e) motion for reconsideration of the district court's September 1998 order, where the Attorney General alleged neither the discovery of new evidence nor an intervening change in the law; and (2) that the district court did not commit clear error in issuing the protective order?

TABLE OF CONTENTS

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* i

QUESTION PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 5

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Calderon v. U.S. District Court N. D. Cal. (Nicolaus),
98 F.3d 1102 (9th Cir. 1996),
cert. denied, ___ U.S. ___, 137 L.Ed.2d 1036 (1997) 2

Hickman v. Taylor,
329 U.S. 495 (1947) 8

Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills,
141 F.3d 1284 (8th Cir. 1998) 6

McDowell v. Calderon,
130 F.3d 833 (9th Cir. 1997) (*en banc*),
cert. denied, ___ U.S. ___, 140 L.Ed.2d 807 (1998) 1

McDowell v. Calderon,
197 F.3d 1253 (9th Cir. 1999) (*en banc*) ..... passim

On Command Video Corporation v. Lodgenet Entertainment Corporation,
976 F.Supp. 917 (N.D. Cal. 1997) 9

Pasatiempo v. Aizawa,
103 F.3d 796 (9th Cir. 1996) 6

Poliquin v. Garden Way, Inc.
989 F.2d 527 (1st. Cir. 1993) 8

Rodriguez v. Fullerton Tires Corp.,
115 F.3d 81 (1st Cir. 1997),
aff'd 115 F.3d 81 (1st Cir. 1998) 6

Seattle Times Co. v. Rhinehart
467 U.S. 20,
cert. denied, 467 U.S. 1230 (1984) 8

United States v. Simmons,
390 U.S. 377 (1968) 8

Upjohn Co. v. United States,
449 U.S. 383 (1981) 8

Wharton v. Calderon,
127 F.3d 1201 (9th Cir. 1997) 2

Younger v. Harris,
401 U. S. 37 (1971) 3, 8

STATUTES

Rule of the Supreme Court of the United States
Rule 10 5

Federal Rules of Civil Procedure
Rule 26(c) 8
Rule 59(e) ..... passim

Rules Governing Section 2254 Cases
Rule 6 7

TREATISES

C. Wright, et al, Federal Practice and Procedure (1995 Ed.)
§ 2040 9
§ 2041 9
§ 2810.1 6

Manual for Complex Litigation (Third), Federal Judicial Center (1995)
§ 41.36 9

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 99-___

ARTHUR CALDERON, Warden

Petitioner,

v.

CHARLES E. McDOWELL, JR.

Respondent.

Respondent Charles E. McDowell, Jr. ("McDowell"), respectfully requests that this Court deny the petition for writ of certiorari filed by petitioner Arthur Calderon (the "Warden"), seeking review of the Ninth Circuit's *en banc* opinion in this case. That opinion is reported at 197 F.3d 1253 (9th Cir. 1999) (*en banc*).

STATEMENT OF THE CASE

This is a capital case. In December 1990, after exhausting his state court remedies McDowell initiated federal habeas corpus proceedings. In November 1997 the Ninth Circuit, *en banc*, reversed McDowell's death sentence on the basis of an instructional error. McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997), cert. denied, ___ U.S. ___, 140 L.Ed.2d 807 (1998). McDowell was then retried in state court. On December 1, 1999 he was again sentenced to death.

In February 1994, when the parties were litigating McDowell's habeas corpus petition in the district court, the court granted a motion by the Warden for

discovery of McDowell's former trial counsel's files, subject to a Protective Order, which provides as follows:

> All documents produced to [the Warden] pursuant to [the Warden's] motion to discover trial counsel's file shall be deemed to be confidential. These documents may be used only by representatives from the Office of the California Attorney General and may be used only for purposes of any proceedings incident to the petition for writ of habeas corpus pending before this Court. Disclosure of the contents of the documents and the documents themselves may not be made to any other persons or agencies, including any law enforcement or prosecutorial personnel or agencies without an order from this Court. This order shall continue in effect after the conclusion of the habeas corpus proceedings and specifically shall apply in the event of a retrial of all or any portion of petitioner's criminal case.

Warden's Appendix C. The Protective Order thus prohibits the Attorney General from disclosing the documents produced to him in discovery, consisting of copies of confidential documents obtained from McDowell's trial counsel's files, outside the scope of the federal habeas corpus proceedings.

The Warden sought reconsideration of the Protective Order in the district court, which was denied, but did not seek review in the Ninth Circuit, either under the collateral order doctrine, see, e.g., Wharton v. Calderon, 127 F.3d 1201 (9th Cir. 1997) (protective order in habeas corpus proceedings is reviewable under collateral order doctrine), or by way of writ of mandate, see, e.g., Calderon v. U.S. District Court N. D. Cal. (Nicolaus), 98 F.3d 1102 (9th Cir. 1996), cert. denied, ___ U.S. ___, 137 L.Ed.2d 1036 (1997) (petition for writ of mandate is appropriate vehicle for warden in federal habeas corpus proceeding to challenge pre-petition discovery order). Instead, the Attorney General accepted discovery of Bates-stamped copies of confidential documents from trial counsel's files, subject to the terms and conditions of the Protective Order.

After conducting an evidentiary hearing on McDowell's ineffective assistance of counsel claims the district court denied all relief, and McDowell appealed. The Warden did not challenge the Protective Order by way of cross-appeal. The Ninth Circuit, *en banc*, reversed the death sentence and remanded the case to the district court with instructions to issue the writ of habeas corpus as the penalty phase of McDowell's trial.

On September 15, 1998, the district court issued its "Order Issuing Writ of Habeas Corpus." Warden's Appendix D. The last sentence of the court's order states that the Protective Order "shall remain in effect." Id. at 2. The Warden did not appeal that order. Instead, the Warden filed a motion for reconsideration, under Fed. R. Civ. P. 59(e). The district court denied that motion by order filed November 2, 1998. Warden's Appendix E. The Warden then appealed the denial of the Rule 59(e) motion.

On April 7, 1999, a three-judge panel issued an opinion holding that the Protective Order should not have been issued and directing the district court to vacate it, on the grounds, *inter alia*, that it constituted an "anticipatory interference" with state court proceedings, in violation of Younger v. Harris, 401 U. S. 37 (1971). Warden's Appendix B at 3217. McDowell sought rehearing and *en banc* review on the grounds, *inter alia*, that the Younger abstention was inapplicable as a matter of law because no state court proceeding was pending either when the Protective Order was issued, or when the district court issued its September 15, 1998 Order stating that the Protective Order would "remain in effect."

The Ninth Circuit granted rehearing *en banc*, withdrew the three-judge panel opinion, and on December 1, 1999, issued its opinion affirming the district court's denial of the Warden's Rule 59(e) motion. McDowell v. Calderon, 197 F.3d 1253, (9th Cir. 1999) (*en banc*). The Court noted that the only order before

the Court was the district court's November 2, 1998 order denying the Warden's motion for reconsideration; the Warden never appealed either the Protective Order itself when it was issued in 1994, or the district court's September 15, 1998 order reaffirmed that it would "remain in effect." Id. at 1254-1255. The Court noted that the Warden did not alleged (much less establish) either the discovery of new evidence or an intervening change in the law, which are grounds for relief under Rule 59(e), and therefore concluded that the underlying Protective Order was subject to review under the "clear error of law" standard. Id. at 1255.

The Court then construed the Protective Order as merely prohibiting the Attorney General from disclosing the documents produced to him during the habeas corpus proceedings, and noted that the parties had conceded that the Protective Order did not preclude the District Attorney, on retrial in state court, from independently seeking access to the original documents using the means available under state law. Id. at 11255 and n. 5. ("The parties agree that the protective order does not preclude the District Attorney from seeking to obtain from McDowell's original trial counsel the same documents that were turned over to the Attorney General. Any such attempt would be governed by state law.") The Court noted that district courts have broad discretion in fashioning protective orders, and concluded that the Protective Order in this case did not "fall clearly outside the bounds of that authority." Id.

McDowell was retried during the pendency of the *en banc* proceedings and was again sentenced to death.

REASONS WHY THE PETITION SHOULD BE DENIED

THE *EN BANC* DECISION BELOW DOES NOT CONFLICT WITH ANY FEDERAL PRECEDENT FROM THIS COURT OR ANY CIRCUIT COURT

The Warden has failed even to argue, much less to show, that this case meets the standards governing review on writ of certiorari, as generally set out in Rule 10 – i.e., that the *en banc* decision below conflicts with the decision of any other United States court of appeals, or departs from the accepted and usual course of judicial proceedings. This case, in fact, fails to meet the requirements of Rule 10.

Contrary to the Warden's assertion that the standard of review applied by the Court below is "wholly irrelevant" (Petition at 11), the procedural posture of this case is in fact dispositive and renders this case inappropriate for review on writ of certiorari. The Court below properly identified and applied established standards of review. Moreover, the Protective Order itself is substantively unobjectionable. It is not directed to the state court, and did not interfere with state trial court proceedings, which in any event are now concluded.

I. The Ninth Circuit, *En Banc,* Correctly Concluded That The District Court Did Not Abuse Its Discretion In Denying the Warden's Rule 59(e) Motion.

As the Court below noted, the Warden never appealed the Protective Order itself. The Court therefore properly concluded that the issue before it was whether the district court had abused its discretion in denying the Warden's Rule 59(e) motion to reconsider the September 15, 1998 Order reaffirming the Protective Order. Because the Warden failed to allege either the existence of newly discovered evidence or an intervening change in the law, and thus failed to meet the standards for reconsideration under Rule 59(e), the Court concluded that the Warden could not establish abuse of discretion. The Court therefore reviewed the

Protective Order itself under the "clear error" standard. Applying the "clear error" standard of review, the Court correctly noted that district court's have broad discretion in fashioning discovery orders, and concluded that the issuance of the Protective Order was not clearly erroneous.

The Court's handling of this appeal was procedurally and substantively correct. It is well established that reconsideration of a judgment under Rule 59(e) is an extraordinary remedy. C. Wright, et al, Federal Practice and Procedure, § 2810.1, at 124 (1995 Ed.). The denial of a motion for reconsideration under rule 59(e) is reviewed for abuse of discretion. Pasatiempo v. Aizawa, 103 F.3d 796, 801 (9th Cir. 1996); Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284 (8th Cir. 1998); Rodriguez v. Fullerton Tires Corp., 115 F.3d 81 (1st Cir. 1997), aff'd 115 F.3d 81 (1st Cir. 1998). Although specific grounds for a motion to "amend or alter" are not spelled out in the rule, relief is typically granted only if the movant seeks to present newly discovered or previously unavailable evidence, or if there has been an intervening change in controlling law. C. Wright, et al, Federal Practice and Procedure, supra, § 2810.1, at 124-127.

As the Court below correctly noted, the Warden did not even allege either of these elements. McDowell, 197 F.3d at 1255. The Court thus properly concluded that the district court did not abuse its discretion in denying the Warden's Rule 59(e) motion, and then reviewed the judgment sought to be reconsidered – the September 15, 1998 order reaffirming that the Protective Order "shall remain in effect" – for clear error. As explained below, the Protective Order in fact well withstands scrutiny under this standard of review.

II. The Ninth Circuit, *en Banc*, Correctly Concluded That The District Court Did Not Commit Clear Error In Issuing the Protective Order

Ignoring the procedural posture of this case and the applicable standards of review, the Warden argued in the Ninth Circuit, and argues here, that by issuing the Protective Order the district court "wrongfully" precluded the state court from ruling on state law questions pertaining to the attorney-client privilege, and "meddl[ed]" in "ongoing" state criminal proceedings. See, e.g., Petition at 9. The Warden's belated objections to the Protective Order are unavailing.

First, the Warden ignores the plain terms of the Protective Order, which covers only those documents actually produced to the Warden in response to his request for discovery in the course of the federal habeas corpus proceedings – i.e., the Attorney General's copies of those documents produced from McDowell's trial counsel's files subject to the Protective Order. The Protective Order thus states: "All documents produced to respondent pursuant to respondent's motion to discover trial counsel's file shall be deemed to be confidential. These documents may be used only by representatives from the Office of the California Attorney General and may be used only for purposes of any proceedings incident to the petition for writ of habeas corpus pending before this Court." Appendix C. As the Court below noted, nothing in the Protective Order prevented the District Attorney, on retrial, from independently seeking access to McDowell's trial counsel's files. McDowell, 197 F.3d at 1255, n. 5. Such attempts would be governed by state law. Ibid. The District Attorney simply may not obtain them from the Attorney General, who obtained them in federal court under federal law – i.e., pursuant to Rule 6 of the Rules Governing Section 2254 Cases – in order to rebut McDowell's federal claims of ineffective assistance of counsel. Thus, contrary to the Warden's assertion, by issuing the Protective Order the district court did not "wrongfully invade the sovereign jurisdiction of the co-equal

California courts." Petition at 9.

Moreover, because no state court proceedings were pending either when the district court issued its Protective Order in 1994 or when it reaffirmed it in September 1998, the Younger abstention doctrine is wholly inapplicable, as a matter of law. Petition at 9; Younger v. Harris, 401 U.S. 37 (1971). When the parties were litigating McDowell's habeas corpus claims in federal district court, all state court appellate and post-conviction proceedings had been concluded. That is what the exhaustion requirement compels. McDowell's subsequent state court retrial obviously was not "pending" until after the federal habeas corpus proceedings had been concluded with the issuance of the writ of habeas corpus – i.e., well after the Protective Order had been issued and then reaffirmed.

Finally, as the Court below acknowledged, "district courts have broad discretion to fashion discovery orders under Fed. R. Civ. P. 26(c), and the protective order did not fall clearly outside the bounds of that authority." McDowell, 197 F.3d at 1256; see also Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984), cert. denied, 467 U.S. 1230 (1984); Poliquin v. Garden Way, Inc., 989 F.2d 527, 532 (1st. Cir. 1993). The Protective Order covers the Attorney General's copies of certain documents that were maintained by McDowell's former trial counsel in connection with McDowell's 1984 trial. The Attorney General obtained these privileged and confidential documents only because the district court granted his motion for leave to take discovery under Rule 6 of the Rules Governing Section 2254 Cases. By asserting claims of ineffective assistance of counsel McDowell waived only the attorney-client privilege, as to those claims only; he did not waive any other applicable privilege or protection, including the work product doctrine, see Hickman v. Taylor, 329 U.S. 495, 510-512 (1947); Upjohn Co. v. United States, 449 U.S. 383, 400 (1981), or the Fifth Amendment privilege, see United States v. Simmons, 390 U.S. 377 (1968). The

Protective Order thus permitted the Warden to defend against McDowell's claims of ineffective assistance of counsel, while preserving the confidentiality of McDowell's trial counsel's files for other purposes.

The Protective Order is hardly extraordinary in limiting the disclosure of confidential information to the federal action in which the discovery was obtained. See, e.g., On Command Video Corporation v. Lodgenet Entertainment Corporation, 976 F.Supp. 917 (N.D. Cal. 1997) (use in subsequently filed state court action of documents covered by protective order issued in federal action constitutes violation of protective order warranting finding of contempt; protective order intended to limit use of subject documents to the federal litigation). District courts routinely use protective orders to control discovery by limiting disclosure of privileged or propriety documents to the federal litigation before them. See, e.g., Manual for Complex Litigation (Third), Federal Judicial Center (1995) § 41.36; C. Wright, et al., Federal Practice & Procedure, supra, §§ 2040, 2041.

CONCLUSION

For the foregoing reasons, respondent Charles E. McDowell, Jr., respectfully requests that the petition for writ of certiorari be denied.

Dated: March 7, 2000

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